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82-1601

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

GEARY GILMORE,
Petitioner

-vs-

THEODORE KOEHLER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No. 82-1334

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STATEMENT OF QUESTIONS PRESENTED

I

Whether the prosecutor deprived petitioner of his right under *Brooks* v *Tennessee*, 406 US 605 (1972) by arguing to the jury that petitioner by remaining in the courtroom while other witnesses testified and by testifying last had 'the opportunity to alter [his] testimony to fit that of other witnesses'.

II

Whether petitioner was deprived of his right to trial by jury when the court instructed the jury that they were not to substitute their judgment as to whose voice appeared on a voiceprint for that of the expert who testified for the prosecution.

III

Whether petitioner was deprived of his right to confrontation when counsel for a co-defendant who did not testify stated in argument to the jury that his client did not do the killings and that his only sin was not preventing the killings because of fear that he himself would be killed.

IV

Whether petitioner was deprived of a fair trial where he was charged with having kidnapped and murdered two small boys and the prosecution as part of its rebuttal case adduced evidence that petitioner had murdered a third person and the prosecutor in argument suggested to the jury that petitioner had murdered a third and a fourth person.

TABLE OF CONTENTS

Page

STATEMENT OF QUESTIONS PRESENTED i
AUTHORITIES CITED iii
JURISDICTION OF THE COURT 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
STATEMENT OF PERTINENT FACTS 3
REASONS FOR GRANTING WRIT 4
I 4
II 6
III 8
IV 9
CONCLUSION 11
RELIEF SOUGHT 11
APPENDIX
Order of the United States Court of Appeals Sought to be Reviews 1a
Opinion of the Michigan Court of Appeals Affirming Petitioner's Conviction 5a

AUTHORITIES CITED

Cases: Page

Brooks v *Tennessee*, 406 US 605 (1972) ..... i, 4

Davis v *Alaska*, 415 US 308 (1974) 9

Griffin v *California*, 380 US 609 (1965) 5, 6

People v *Smith*, 23 Mich App 463 (1977) 1, 6, 7, 9

Snyder v *Massachusetts*, 291 US 97 (1934) 5

United States ex rel Macon v *Yeager*, 476 F2d 613 (CA3 1973) 5

Other:

6th Amend, US Constit 1, 7, 9

14th Amend, US Constit 1, 5, 11

28 USC 2254 ..... 1, 2

JURISDICTION OF THE COURT

The Order of the Court of Appeals sought to be reviewed is dated February 9, 1983 and it was entered on February 9, 1983.

Jurisdiction to review this Order is conferred, it is believed, upon this Court by 28 USC 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 6, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This case originated in the Circuit Court for the County of Wayne, State of Michigan, seated in the City of Detroit, a court of general jurisdiction including jurisdiction over felonies committed in the County of Wayne.

Petitioner and two co-defendants were charged in the first and second counts of the information with murder of the first degree in the killing of two small boys, and in the third and fourth counts with the kidnapping of the same two boys. The murder counts were elevated to the first degree by predication upon the felony of kidnapping alleged in the third and fourth counts.

The case was tried to a jury, petitioner and his two co-defendants were convicted on all four counts, and each was setnenced to a life term on each of the four counts, the life terms on the first two counts being without hope of parole.

Petitioner appealed his convictions as a matter of right to the Michigan Court of Appeals, and his convictions were affirmed in that court. *People* v *Smith*, 73 Mich App 463 (1977).

An appeal to the Michigan Supreme Court is a discretionary appeal; petitioner's application for leave to appeal to the Michigan Supreme Court was denied by that court.

Petitioner then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Michigan under authority of *28 USC 2254*. By judgment of that court, said petition was denied.

After obtaining a certificate or probable cause, petitioner appealed as of right the judgment denying habeas corpus to the United States Court of Appeals for the Sixth Circuit. By Order dated February 9, 1983, the Court of Appeals in Case No. 82-1334 affirmed the judgment denying habeas corpus.

Subsequently, the Michigan Court of Appeals affirmed the trial court's vacation of petitioner's convictions for kidnapping on the basis of violation of the guarantee against double jeopardy.

STATEMENT OF PERTINENT FACTS

Keith Arnold, aged 6 years, and Gerald Kraft, aged 8 years, disappeared from the vicinity of their homes in December, 1973. Ransom demands were received by the families. Several days later, the bodies of the two boys were found in open fields; each had been shot twice in the head with the same weapon.

Petitioner and one Smith and one Holloway were arrested and charged with the crimes.

On trial, several witnesses testified to the presence of the two victims in a certain apartment and to the fact that each of the three defendants was present at different times in the apartment. There was testimony from the witnesses that one Gary Braceful was also seen at various times in the apartment.

A tape of a telephone ransom demand was admitted into evidence. An expert witness opined that the voice was that of defendant Holloway. The trial judge instructed the jury that they were not to substitute their opinions as to whose voice appeared on the tape in place of the expert.

Petitioner's pre-trial motion for a separate trial was denied. On trial, defendant Holloway did not testify. In his argument to the jury, Holloway's counsel told the jury that Holloway's only crime was that he did not prevent the killing of the two boys.

Petitioner testified and denied his guilt; he claimed to have been elsewhere at the time of the killings. Petitioner related who was present in the said apartment, the comings and goings of the various persons and his presence in the apartment. Petitioner testified that Gary Braceful had come into the apartment with the two boys. Petitioner at no time asserted or claimed that Gary Braceful kidnapped the boys or that Gary Braceful murdered the boys.

Nonetheless, as rebuttal, the prosecution was permitted to adduce evidence that Gary Braceful was dead, that he had been shot with the same gun that had been used to shoot the two boys. And the prosecutor in his argument to the jury, clearly argued that petitioner had murdered Gary Braceful and a young lady whose apartment petitioner had used.

The prosecutor also argued to the jury that the petitioner and his two co-defendants had the advantage of being able to sit in court through the entire trial and hear the testimony of the other witnesses and then to tailor their testimony to fit the testimony given by the other witnesses.

REASONS FOR GRANTING THE WRIT

I

In his summation to the jury, the prosecutor stated to the jurors as follows:

> 'You will also observe that the defendants themselves in this particular case had the unique ability in Court to watch everyone else testify and then take the stand. All of the other witnesses remained out of the courtroom while everyone else testified and then came in to court and testified. *I suggest to you that that gives them the opportunity to alter their testimony to fit that of other witnesses.*' (Trial Tr 3873-74)

In *Brooks* v *Tennessee*, 406 US 605 (1972), this Court held that a state statute which compelled a defendant who desired to testify at his trial to do so before any testimony is heard for the defense violates the defendant's privilege against self-incrimination and also constitutes a denial of due process in that it infringes upon the defendant's constitutional right to the guiding hand of counsel in deciding whether to testify and at what stage of the trial.

It is a basic and fundamental aspect of due process which is protected by the *14th Amendment to the United States Constitution* that a criminal defendant be present in court at all times when the jury is present and receiving evidence. *Snyder* v *Massachusetts*, 291 US 97 (1934).

Thus, we have a situation in the case at bench wherein the prosecutor made it costly to petitioner to exercise the rights vouchsafed him by the Constitution of the United States by damning petitioner in the eyes of the jurors for exercising them.

This Court in *Griffin* v *California*, 380 US 609 (1965), ruled that the prosecution could not condemn a defendant for exercising his right under the constitution to remain silent on his trial by arguing to the jury that this very silence is evidence of defendant's guilt.

In *United Staes ex rel Macon* v *Yeager*, 476 F2d 613 (CA3 1973), the prosecutor in a state criminal trial in his summation to the jury adverted to the fact that after the happening of the events involved in the case, the defendant called his lawyer, and suggested that this bespoke the guilt of the defendant. The Court upheld the district court's grant of habeas corpus on the grounds that the prosecutor's remark violated the defendant's right under the 6th Amendment to assistance of counsel, and the Court analogized to *Griffin, supra*, that the prosecutor's remark imposed a penalty for the exercise of a constitutional privilege and dminished the privilege by making its exercise too costly.

The United States Court of Appeals in its Order did not advert to this issue in any manner.

The Michigan Court of Appeals disposed of this issue in the following manner:

> 'Error is next alleged because the prosecution stated in summation that defendants' presence in court gave them opportunity to alter their testimony.

'No objection was made to these comments. Consequently, under the standard applicable to determine whether we will review prejudicial remarks of prosecution in a closing argument, we find no basis to believe a curative instruction would not have removed any error. . . .

'However, defendants maintain a constitutional violation of their right to be present at trial. [Citation omitted.] We feel the remark was inadvisable. However, in the full context of the summation, we believe the error was harmless. [Citation omitted.] We decline to reverse on this ground.' *People* v *Smith*, 73 Mich App 463, 470-471 (1977).

This Court should address this issue because the Michigan Court of Appeals has decided—and the federal Court of Appeals has ignored—'an important question of federal law which has not been, but should be, settled by this Court'.

This Court should act firmly in following *Griffin* and *Macon* and hold it to be error of constitutional dimensions for a prosecutor to argue to the jury as the prosecutor did in the case at bench lest every accused brought to trial in the State of Michigan be condemned by the trial prosecutor for remaining in the courtroom during his trial and exercising his right to testify as the last witness for the defense.

II

One of the telephone ransom calls was taped. On trial a 'voiceprint' expert was called by the prosecution and he opined that the voice on the tape was that of defendant Holloway.

The tape itself was played for the jury. Prior to its being played, the trial judge gave the following cautionary instruction to the jury:

'Two precautionary instructions to the Jury, this is being given to you for the sole purpose of you determin-

ing the expertise of this witness, determining what he states, his technique and his background and his learning and what he used, the tools to make the comparison. *You understand you cannot assume the role of the expert in, and decide from those whose voice that is.* In other words, you're only looking at this opinion and what he based his opinion on. *You cannot decide it's not this defendant and someone else. Do you understand that it's not your role as jurors*?' (Trial Tr 2353)

In the quoted cautionary instruction, the trial judge deprived the jury of its function as the sole decider of the facts in the case and deprived petitioner of his right to trial by jury under the *6th Amendment to the United States Constitution.*

The Michigan Court of Appeals disposed of this issue by stating that petitioner had no standing to object to the cautionary instruction because the evidence was admitted against defendant Holloway, not petitioner. *People* v *Smith, supra,* at 471.

The United States Court of Appeals stated that petitioner's constitutional rights were not violated 'by the proceedings involving identification of the voice of Holloway as the caller who was seeking extortion money or a kidnap ransom' simply because of '[t]he fact that the prosecution tied the caller, Holloway, to appellant, Gilmore, in respect to the kidnapping and the ultimate tragic outcome of the kidnapping'.

When three defendants are tried by the prosecution on the theory that they acted in concert in the kidnapping of two boys and in their murder, can it be said that when incriminating evidence in adduced in connection with only one of the defendants that the other two have no standing to complain of constitutional violations in connection with the introduction of that evidence?

This issue involves 'an important question of federal law which has not been, and should be, settled by this Court'.

III

Co-defendant Holloway did not testify. Nonetheless, Holloway's counsel in his argument to the jury presented this defense to the jury on behalf of Holloway: counsel told the jury that Holloway's only sin was that he did not stop the killing of the two boys, that Holloway did not do the killing, and that if Holloway tried to stop the killings, he probable would have been killed also.

This is what Holloway's counsel told the jury:

'You remember when Peter betrayed Christ. After learning what he had done, he had gone into the crowd and trailing from afar off, he got into the crowd and said, do you know him? He said no, I don't know him. What did he do? He went away and wept bitterly. I don't know why on Easter Sunday morning, he came back. Go and tell my deciples (sic), and Peter, too: The same man who betrayed Christ. Why did he do that? Why did he ask for Peter? I believe this was because he wept. *His remorse, not for that what he had done, but what he had failed to do,* to save the man who was a friend, who had done nothing to him, because he had but, cut off that morning. *He wept because he was unable to see within himeslf, I didn't stop it, caught in the middle, if I do, we'll probably be killed but I did not do this, so he wept.* Payne. I asked her if she was afraid of him then. She said, no. He was nervous, upset; I hurt my mother. He wept. Can you in good conscience on this record if you can, do you job.' (Trial Tr 3891-92)

This was testimony by Holloway's counsel. But counsel had not taken the oath and he was not subject to cross-examination by petitioner. If Holloway had taken the witness stand and given like testimony, petitioner would have had a chance to cross-examine him.

As it was, Holloway's counsel gave very devastating testimony against petitioner, and petitioner was deprived of his right to confront counsel and to cross-examine him as

was petitioner's right under the *6th Amendment to the United States Constitution. Davis* v *Alaska*, 415 US 308 (1974).

The Michigan Court of Appeals disposed of this issue by stating that 'we do not even perceive how the remarks of defendant Holloway's counsel couched in biblical terms, could incriminate defendants Gilmore and Smith'. *People* v *Smith, supra*, at 469.

The United States Court of Appeals disposed of this issue with the following statement: 'These remarks do not constitute any charge, inference or statement that appellant was the criminal actor; they represent an attempt on Hollway's lawyers' (sic) part to explain away testimony of witness (sic) that could be deemed detrimental to his client'.

IV

In the information filed against petitioner, he was charged with having kidnapped two small boys and then murdering them. Petitioner was not charged with any other crime.

Still, the prosecution was allowed to adduce in guise of rebuttal testimony that Gary Braceful was dead and that he had been shot with the same gun that had been used to shoot the two boys. And the prosecutor elicited from petitioner the fact that one Johnnie Stanley [a female] was dead. And the prosecutor in his argument to the jury clearly implied that petitioner had murdered both Gary Braceful and Johhnie Stanley.

The Court of Appeals held that the testimony concerning the death of Gary Braceful was proper rebuttal because petitioner 'took the position at trial that a third party, Gary Braceful, was really the guilty party, not he'.

However, petitioner in his testimony did not assert or claim that Gary Braceful had committed the murders. The

trial prosecutor recognized this fact in his argument to the jury when he said:

> '[I]f Geary Braceful did it, all they have to do is say Geary Braceful did it. They would not have to lie. If Geary Braceful did it, why not say Geary Braceful did it? Aren't they saying that Geary Braceful did it?' (Trial Tr 4003)

And the prosecutor in his argument to the jury clearly charged petitioner with having murdered Gary Braceful and Johnnie Stanley. This is what the prosecutor said:

> 'Defendant Gilmore went a step further, he not only said that he was elsewhere at the time and had nothing to do with this, but he has the propensity to hide behind dead people. Only the two children can tell us was (sic), for sure, who killed them. They are dead. Only the children can tell us who got them from their neighborhood. We know who took them to the apartment, but who picked them up for sure (sic). The inference is that the three defendants did. But for sure, who did that? They are dead. They cannot tell us. The children could tell us who pulled that trigger on each of them. They are dead. Geary Braceful could tell us who brought those kids to that apartment because the testimony from other witnesses was that he was there when the children were brought in. Gary Graceful could tell us what he knows about this, but he is dead. Mysteriously killed by the same weapon that shot those children. Johnnie Stanley could tell us the reason Defendant Gilmore was at the apartment on Schaefer but she is dead. He says he went there to help her move. But I think the facts warrant the inference that he did not want to be around the 14th street apartment, so he went elsewhere. Johnnie Stanley can't tell us that, because she is dead.' (Trial Tr 3874-3875)

It is clear that introduction by the prosecution of evidence that Gary Braceful was dead and that he had been shot by the same weapon that had been used to shoot the

two boys was not proper rebuttal. The introduction of that testimony and the prosecutor's argument that petitioner had murdered both Gary Braceful and Johnnie Stanley does not comport with the requirements of the *14th Amendment to the United States Constitution* that an accused in a criminal trial be given a fair trial and due process.

CONCLUSION

It is respectfully urged to this Court that the foregoing issues involve important questions of federal constitutional law that should be settled by this Court.

RELIEF SOUGHT

Petitioner respectfully prays this Court issue its Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,
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Detroit, Michigan
March 25, 1983

NO. 82-1334
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEARY GILMORE,
Petitioner-Appellant,

v.

THEODORE KOEHLER, WARDEN,
Respondent-Appellee.

ORDER
(Filed: February 9, 1983)

Before: KEITH, KENNEDY and WELLFORD, Circuit Judges.

This appeal arises from the denial by the district court of Gilmore's petition for habeas corpus under 28 U.S.C. § 2254 for first degree murder and kidnapping. His Michigan State Court conviction for involvement in a heinous offense, kidnapping and killing of two young children, was affirmed by the Michigan appellate court. *See People* v. *Smith*, 73 Mich. App. 463, 252 N.W.2d 488 (1977).

Petitioner appellant first asserts that he was deprived of a fair trial when evidence was admitted suggestive of his involvement in a crime separate from the charged offenses, particularly in light of the prosecutor's mentioning this matter in his jury argument. Appellant took the position at trial that a third party, Gary Braceful, was really the guilty party, not he. The government was permitted to show on rebuttal that Braceful was dead; that appellant was aware that he was dead, and that the same gun was used in the Braceful homicide as in the killing of the young victims. There was other testimony showing that Braceful was at the apartment scene with appellant, where the children were being kept after kidnapping. The prosecutor argued to the jury that appellant was attampting to implicate dead people,

including another person besides Braceful, in the offense and that these persons obviously could not be produced by the prosecution, nor could they defend themselves from appellant's attempts to place the blame on them. This was not error but rather was valid subject matter for rebuttal; the prosecutor's argument concerning this matter did not deprive appellant of a fair trial as asserted.

Upon careful examination of the record, we cannot agree with appellant's characterization of the prosecutor's argument as calculated to inflame the passions of the jury nor did it charge that appellant had murdered persons other than the two boys named in the indictment. The argument did not deprive appellant of any constitutional rights, nor did the argument improperly include the prosecutor's personal views of appellant's guilt. Appellant failed to establish on this record that the prosecution directly tried to charge appellant with commission of another ciminal act during the course of the trial (nor even any indirect effort to this effect during the case-in-chief). As is argued in appellant's own brief "the same person might have killed the two boys and Braceful and [the killer] not be the petitioner." That a possible inference could be drawn through legitimate circumstantial rebuttal proof that appellant may have been involved in another offense of like kind to that charged is an insufficient basis for relief on this ground asserted.

Appellant's next assignment of error is directed to the trial court's charge to the jury in respect to voice print testimony and the circumstances of its admission into evidence. An expert witness was permitted to give his opinion that a voice on a tape of one of the alleged kidnapping participants making a phone call was that of a co-defendant on trial, Jerome Holloway. The counsel for defendant Holloway objected and this objection, in our view, was properly overruled by the trial judge. Appellant concedes that at the time of this ruling the judge stated that the evidence now disputed by this appellant was not offered to determine the guilt or innocence of appellant or another co-defendant

on trial. When the tape of the extortion phone call was played to the jury, the judge gave special instructions that the jury was not to assume the role of the expert as to whose voice was that of the unknown caller and further "that is not the intention of the People to have any probative value whatsoever as far as the defendant Smith or Gilmore are concerned." There was no error in the admission of the expert testimony; it is doubtful, moreover, that even if error had been committed in this regard that it adversely affected this appellant, particularly in light of the later precautionary instrucitons. The fact that the prosecution tied the caller, Holloway, to appellant, Gilmore, in respect to the kidnapping and the ultimate tragic outcome of the kidnapping is not any basis for appellant's claim that his constitutional rights were somehow prejudiced by the proceedings involving identification of the voice of Holloway as the caller who was seeking extortion money or a kidnap ransom.

Finally, appellant contends that prejudicial error occurred at trial in respect to the comments made by counsel for co-defendant, Holloway, to the jury. Holloway, it should be noted, did not testify at the trial, although his voiceprint was in evidence as previously discussed. Appellant characterizes other counsel's arguments as inferring that Holloway could have stopped the murders of the boys by appellant and the other co-defendant but he failed and that was why Holloway wept as was testified by a witness. This is the interpretation placed by appellant on the following remarks of Holloway's attorney:

> 'He wept because he was unable to see within himself, I didn't stop it, caught in the middle. If I do, we'll probably be killed but I did not do this."

These remarks do not constitute any charge, inference or statement that appellant was the criminal actor; they represent an attempt on Holloway's lawyers' part to explain away the testimony of witness that could be deemed detri-

mental to his client. The trial judge acted within his sound discretion in denying Gilmore's motion for severance, and appellant has failed to demonstrate that actions complained about at trial had a substantial or unfairly prejudicial effect upon him simply because he was on trial with co-defendants Smith and Holloway.

Accordingly, the judgment of the trial court is AFFIRMED.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

OPINION

MICHIGAN COURT OF APPEALS
Decided: February 2, 1977
Reported: 73 Mich App 463

PEOPLE v SMITH
PEOPLE v HOLLOWAY
PEOPLE v GILMORE

* * *

Appeal from Wayne, James N. Canham, J. Submitted October 5, 1976, at Detroit. (Docket Nos. 27045, 21830, 24016.) Decided February 2, 1977. Leave to appeal applied for.

Byron A. Smith, Jerome Holloway and Geary Gilmore were convicted of murder committed in the perpetration of a kidnapping and of kidnapping. Defendants appeal. Affirmed.

* * *

Before: V.J. BRENNAN, P.J., and BRONSON and BASHARA, JJ.

V.J. BRENNAN, P.J. Defendants were tried jointly and convicted by a Wayne County Circuit Court jury of murder committed in the perpetration of a kidnapping, MCLA 750.316; MSA 28.548, and kidnapping, MCLA 750.349; MSA 28.581. All three defendants were sentenced to concurrent life terms. All three defendants appeal as a matter of right.

In simplified terms, the facts of this matter arose in the following order. On December 1, 1973, Keith Arnold and Gerlad Kraft, aged six years and eight years respectively, disappeared in late afternoon while playing near their homes on Inverness in the city of Detroit.

At 9 o'clock that evening, Roy Hillyer, a friend of the Arnold family, received a telephone call demanding $53,000 ransom for the return of the children. Police were notified immediately and telephone surveillance was established.

Two subsequent calls were received on December 1 and December 2, 1973, one taken by Marjorie Arnold, the mother, and one by Linda Ellis Keith Arnold's sister. Both calls demanded ransom in the same general amount. Linda Ellis later testified that the calls she received all seemed made by the same person.

As ordered, Roy Hillyer went to a specified public telephone booth on December 2, 1973, where he received a call instructing him to deliver a bag with the ransom to an address on Griggs Street. The delivery was made with a dummy ransom bag. Meanwhile, police had established a surveillance at the telephone booth. After some moments, officers observed defendant Smith come to the booth, lift the receiver and look around. Testimony also placed defendant Holloway in the immediate area of the dummy drop at the same time.

On December 4, 1973, the Wayne County Sheriff's office reported finding the boys' bodies in two fields located in Romulus, Michigan. The boys had each been shot twice in the head from the same weapon. Neighbors reported hearing the shots the previous evening about 7 o'clock.

At trial, various prosecution witnesses placed all three defendants and the two kidnapped boys in the 14th Street apartment of Fannie Johnson, sister-in-law of defendant Gilmore, on the evening of December 1, 1973. The two boys remained there until December 3, 1973. At least one of the defendants was there at all times during this period. On the morning after the boys' bodies were discovered, police found defendant Gilmore at an apartment on Schaeffer Road and placed him under arrest. Defendant Smith was arrested on December 4, 1973 in the company of an acquaintance, Lucinda Prewitt. Defendant Holloway voluntarily surrendered himself to police on December 5, 1973.

On appeal, because the basic legal questions presented by defendants Gilmore, Smith and Holloway are very similar, we will attempt to discuss them together. Where distinct allegations are raised, we will address them separately.

Defendants Gilmore, Smith and Holloway all contend that reversible error occurred when the trial court denied their pretrial motions for severance. We do not agree.

The decision whether to hold joint or separate trials is discretionary with the trial court. MCLA 768.5; MSA 28.1028.[1] *People* v *Hurst*, 396 Mich 1, 11; 238 NW2d 6 (1976). In moving the court for separate trial, defendant must "show that his substantial rights will be prejudiced by a joint trial". *People* v *Scott*, 61 Mich App 91, 94; 232 NW2d 315 (1975). See *People* v *Schram*, 378 Mich 145, 156; 142 NW2d 662 (1966). A supporting affidavit defining the inconsistencies between the defenses of the parties is required before an abuse of discretion will be found. *People* v *Mullane*, 256 Mich 54, 56; 239 NW 282 (1931).

No affidavits were attached to defendants' motions. Nor did the statements contained in defendants' motions adequately assert "the full scope of the antagonism between his and his co-defendant's defenses". *People* v *Markham*, 19 Mich App 616, 635; 173 NW2d 307 (1969). The only substantial claim made by defendants Gilmore and Smith is that they could not call their co-defendants to testify in a joint trial; and this claim is largely vitiated by decisions indicating that co-defendants, even if tried separately, cannot be compelled to testify against their will. *People* v *Merritt*, 396 Mich 67, 84, n 18; 238 NW2d 31 (1976); *People* v *Van Alstine*, 57 Mich 69, 82; 23 NW 594 (1885). In the same vein, authority exists to answer defendant Holloway's allegation that he was denied his right of confrontation in a joint trial where he was not allowed to cross-examine his co-defendants. *State* v *Moore*, 101 NW2d 579, 587 (ND, 1960). We find no abuse in the trial court's denial of the respective motions.

Neither do we feel the trial court erred by failing to grant defendants Gilmore and Smith a separate trial *sua sponte* after the closing argument by defendant Holloway. *People* v *Rogers*, 39 Mich App 157, 161; 197 NW2d 292

[1] "When 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court." MCLA 768.5; MSA 28.1028.

(1972). Further, we do not even perceive how the remarks of defendant Holloway's counsel concerning Holloway's mental state, which counsel couched in biblical terms, could incriminate defendants Gilmore and Smith. *People* v *Hurst*, *supra* at 4.

Defendants Gilmore and Smith next contend the trial court abused its discretion by allowing rebuttal evidence that Gary Braceful, a person connected with the case, had been killed by the same gun used to kill the two boys.

Gary Braceful was mentioned frequently during the trial. He was present numerous times during the period the boys were being held at the 14th Street apartment. Defendant Gilmore's testimony clearly implicated Braceful as the sole party to the crime. Consequently, objection arose to police rebuttal indicating that the gun which killed Braceful was the same gun used to kill the two boys.

We feel the police testimony was proper rebuttal, not improper evidence of another crime. *People* v *Utter*, 217 Mich 74, 83; 185 NW 830 (1921). Therefore, we find no abuse of discretion. *People* v *Ames*, 60 Mich App 168, 172; 230 NW2d 360 (1975). See *People* v *Williams*, 386 Mich 565, 571-573; 194 NW2d 337 (1972). Evidence introduced by defendant Gilmore inculpating Braceful as the sole participant in the crime clearly justifies prosecution rebuttal. We also believe this testimony regarding the gun did not improperly inject another crime into the case where its relevancy as rebuttal evidence was found by the trial court to outweigh its prejudicial effect.

Defenants Gilmore and Holloway argue next that the prosecution's summation was improper. We do not agree.

No objection to any of those comments made was raised at trial. In such circumstances, the remarks will not be reviewed unless the following obtains:

> "The general rule in Michigan is that a defendant's failure to object to allegedly improper remarks made by the prosecutor during closing argument precludes appellate review unless it can be said that an objection and the appropriate curative instruction could not have eliminated the prejudice arising from the prosecutor's

statements. *People* v *Tarpley*, 41 Mich App 227; 199 NW2d 839 (1972), *People* v *Humphreys*, 24 Mich App 411; 180 NW2d 328 (1970)." *People* v *McLendon*, 51 Mich App 543, 547; 215 NW2d 742 (1974).

Viewing the allegedly improper comments within the full context in which they were made, we feel the remarks were not so improper that they could not have been corrected by a curative instruction. *People* v *Scott*, 65 Mich App 657, 659-660; 237 NW2d 602 (1975). See *People* v *Blake*, 58 Mich App 685, 688; 228 NW2d 519 (1975). We decline to review them now.

Error is next alleged because the prosecution stated in summation that defendants' presence in court gave them opportunity to alter their testimony.

No objection was made to these comments. Consequently, under the standard applicable to determine whether we will review prejudicial remarks of prosecution in a closing argument, we find no basis to believe a curative instruction would not have removed any error. *People* v *Scott*, *supra* at 659-660. We also note that this Court has found no error in argument by prosecution that a witness had an opportunity to fabricate. *People* v *Couch*, 49 Mich App 69, 72; 211 NW2d 250 (1973).

However, defendants maintain a constitutional violation of their right to be present at trial. *People* v *Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). We feel the remark was inadvisable. However, in the full context of the summation, we believe the error was harmless. *People* v *Christensen*, 64 Mich App 23, 32-33; 235 NW2d 50 (1975). We decline to reverse on this ground.

Defendant Gilmore contends that the trial court erred in admitting voiceprints of the telephone calls demanding ransom and in limiting the jury's use of them. We disagree.

The evidence was not offered by the prosecution against defendant Gilmore but was solely limited to use against co-defendant Holloway. Therefore, we find defendant Gilmore has no standing to object to its admission. For our authority on this proposition, finding none in Michigan, we

turn to the Federal courts. *United States* v *Rangel*, 488 F2d 871 (CA 5, 1974); *United States* v *Martinez*, 428 F2d 86, 89 (CA 6, (1970). However, we might mention that we do discuss the merits of the voiceprint's admissibility in response to objection by defendant Holloway and find them properly admitted.

As to whether the trial court correctly limited the jury in his charge to determining the credibility of the expert testimony regarding the voiceprint identification, we conclude again that neither defendant Gilmore nor defendant Smith have standing in the matter. *United States* v *Rangel, supra* at 872. In any case, we do not believe the instruction deprived defendants of their right to a jury trial. The instruction was proper.

Defendant Gilmore argues that a search warrant issued for the 14th Street apartment was based on previous illegal activity.

The resolution of this question is entirely factual. Apparently, police early on in the investigation had obtained a tip from the secret witness program directing them to the 14th Street apartment. Officers went to the residence, and entered through an unlocked window when they received no response at the front door. However, testimony also indicated that the warrant subsequently issued was a totally distinct process, based on information given by one Jacquelin Wesley. The court carefully ascertained to its satisfaction that no connection between the two operations existed.

We will not second guess the trial court's estimate of witness credibility, which we feel determinative of this allegation. *People* v *Paille #2*, 383 Mich 621, 627; 178 NW2d 465 (1970). We find no abuse of discretion. We also note that defendant Holloway lacks standing to raise this question on appeal. *People* v *Scott*, 44 Mich App 462, 464; 205 NW2d 291 (1973). He had no possessory interest or control in the apartment.

Defendant Holloway argues that error occurred when the trial court admitted the preliminary examination tes-

timony of Fannie Johnson, who claimed her privilege against self-incrimination at trial.

The record indicates that witness Johnson, though not offered immunity, had refused to testify at trial regardless. At preliminary examination, defendant Holloway thoroughly cross-examined the witness. Under these circumstances, the trial court was correct in ruling that she was unavailable to testify and in admitting the preliminary examination testimony. *People* v *Pickett*, 339 Mich 294, 306-307; 63 NW2d 681 (1954). We find no error.

Defendant Holloway alleges next that the trial court improperly admitted voiceprint identification testimony of him where the exemplar of his voice was taken without *Miranda*[2] warnings.

We immediately note that voiceprints are admissible in Michigan. *People* v *Henderson*, 69 Mich App 418, 421; 245 NW2d 72 (1976); *People* v *Tobey*, 60 Mich App 420, 427-428; 231 NW2d 403 (1975).

What we hold here is that a voiceprint identification of a suspect already in custody is admissible regardless of whether prior *Miranda* warnings were given. Accord, *People* v *Smogoleski*, 14 Mich App 695, 700; 166 NW2d 14 (1968). To this end, we find no violation of defendant's Fifth Amendment privilege against self-incrimination by the admission of these voiceprints as identification evidence at trial. *People* v *Henderson*, *supra* at 427.

The voiceprint was used solely to measure the physical properties of defendant Holloway's voice, "and not for the testimonial or communicative content of what was to be said". *People* v *Tobey*, *supra*, at 428. We do not believe *Miranda* applies in this context. *People* v *Smogoleski*, *supra* at 700. We find no error.

Error is next assigned to the trial court's decision to allow the prosecution to reopen its case after defendant Holloway had begun his case in order to secure testimony of a previously unavailable witness.

---

[2] *Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966).

Ample authority can be found for the proposition that the trial court may "reopen a case for the purpose of admitting testimony in behalf of either the prosecution or the defense". *People* v *Baker*, 332 Mich 320, 324; 51 NW2d 240 (1952). See *People* v *Cissom*, 39 Mich App 80, 81-2; 197 NW2d 282 (1972).

Where proof existed that the witness was a res gestae witness who had only recently returned to the jurisdiction, we can find no abuse of discretion in the court's decision.

Lastly, defendant Holloway contends that insufficient evidence existed to support the verdict. We do not agree.

In testing whether sufficient evidence exists, this Court recently stated the following standard:

> "A challenge to the sufficiency of the evidence is measured by the following test—the evidence is insufficient if it could not support a finding of guilty beyond a reasonable doubt because one or more of the essential elements of the crime is not proved. *People* v *Kremko*, 52 Mich App 565, 574; 218 NW2d 112 (1974)." *People* v *Smith*, 68 Mich App 551, 555; 243 NW2d 681 (1976) (M.J. KELLY, J., dissenting).

The defendant was charged with kidnapping and felony murder. The required proof for felony murder in this case was that the murder was perpetrated in the commission of a kidnapping. We find the following record evidence to support this charge:

(1) the defendant's voice was identified as the one that was on the tape of the ransom call by a person that heard the ransom call;

(2) the defendant was acquainted with the Arnold family;

(3) the defendant was observed by the police in the vicinity of the ransom;

(4) Miss Payne testified that the defendant told her that he would come into some big money;

(5) the defendant, who was present in the 14th Street apartment with the two boys, ordered Miss Payne to stop

talking to them, even in the absence of the other two defendants;

(6) Miss Payne testified that defendant had a gun in his hand while she was in the apartment;

(7) defendant asked Miss Payne if she believed in kidnapping;

(8) defendant told Miss Payne that he told them not to do it and that the little boys asked for his help;

(9) on the evening the little boys disappeared defendant left the apartment with his co-defendant and returned there with the little boys; and

(10) defendant left the apartment with his co-defendants and the little boys on the night of the murder.

We believe these facts clearly sustain the jury verdict and show more than defendant Holloway's "mere presence" during the crime. Therefore, we find no error.

Having reviewed all the alleged errors and having discussed those we consider of merit, we find no grounds to reverse the proceedings below.

Affirmed.

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82-1601

NO. .....

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

Geary Gilmore,

Petitioner

v

Theodore Koehler,

Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI

Court of Appeals No. 82-1334

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Whether argument by the state prosecutor offended Petitioner's rights under the Federal Fourteenth Amendment.

II.

Whether admission of forensic evidence implicating Petitioner's co-defendant and trial court instruction thereon offended Petitioner's rights under the Federal Fourteenth Amendment.

III.

Whether counsel for Petitioner's co-defendant offended Petitioner's right to confrontation under the Federal Sixth Amendment.

IV.

Whether trial court admission of rebuttal evidence and prosecutorial argument thereon offended Petitioner's rights under the Federal Fourteenth Amendment.

TABLE OF CONTENTS

Page No.

Counterstatement of Questions Presented for Review i

Authorities Cited iii

Jurisdiction of the Court 1

Constitutional Provisions Involved 1

Statement of the Case 1

Statement of Pertinent Facts 1

Reasons for Denying the Writ 6

I. 6

II. 7

III. 7

IV. 8

Relief 9

AUTHORITIES CITED

Cases Page No.

Gilmore v *Koehler*, USDC-WN No. M78-12CA2, April 28, 1982 6

Gilmore v *Koehler*, USDCA6, No. 82-1334, March 3, 1983 ..... 6, 7, 8, 9

People v *Gilmore*, 73 Mich App 463; 252 NW2d 488 (1977) 6, 8, 9

Wainwright v *Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977) 6

Other

5th Amend, US Constit 2

6th Amend, US Constit i

14th Amend, US Constit i

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

Geary Gilmore,

Petitioner

v

Theodore Koehler,

Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION OF THE COURT

Respondent accepts Petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts Petitioner's statement of constitutional provisions.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case.

STATEMENT OF PERTINENT FACTS

Respondent accepts the statement of facts offered by Petitioner. In addition Respondent states the following salient facts:

Petitioner was jury convicted in Wayne County, Michigan, Circuit Court of kidnapping and murdering Keith Arnold, age

six, and Gerald Kraft, age eight, following a bungled extortion plot. Petitioner was tried jointly with two co-defendants; Byron Smith and Jerome Holloway.

Prior to trial Petitioner requested severance. It was asserted that joint trial would preclude, on Fifth Amendment grounds, Petitioner from calling as defense witnesses his two co-defendants. Petitioner's motion was denied. The trial court noted that even if separate trials were held the remaining defendants could, and probably would, assert Fifth Amendment privilege.

During summation, counsel for co-defendant Holloway made the following comment:

> You remember when Peter betrayed Christ. After learning what he had done, he had gone into the crowd and trailing from afar off, he got into the crowd and said, "do you know him?". He said, "No, I don't know him". What did he do? He went away and wept bitterly. I don't know why on Easter Sunday morning, he came back. Go and tell my deciples (sic), and Peter, too: The same man who betrayed Christ. Why did he do that? Why did he ask for Peter? I believe this was because he wept. He remorse, not for what he had done, but what he had failed to do, to save the man who was a friend, and who had done nothing to him, because he had but, cut off that morning. He wept because he was unable to see within himself, I didn't do it, caught in the middle, if I do, we'll probably be killed but I did not do this, so he wept. Payne. I asked her if she was afraid of him then. She said, no. He was nervous, upset; I hurt my mother. He wept. Can you in good conscious on this record if you can, do your job!

Following defendant Holloway's summation, no objection or motion for severance was made. The comment was not addressed or responded to during summation by either counsel for Petitioner or defendant Byron Smith.

Among the witnesses called during the prosecutor's case in chief was Philip Arreola of the Detroit Police Department, Voice Print Identification Unit. The witness testified that his comparison of recorded telephonic ransom demands received by the families of Gerald Kraft and Keith Arnold, and voice recordings of defendant Jerome Holloway led him to conclude that Holloway had communicated the extortion calls. Petitioner made no objection to the testimony of witness Arreola.

Prior to playing the tapes compared by Arreola the trial court instructed the jury as follows:

> What we are going to have now, ladies and gentlemen of the Jury, is playing of the portion of the tape which was exhibit 8, a tape cassette of the callers at the home of the complainant. Then we are going to have a playing of the tape cassette, which is exhibit 33, which a known voice of the defendant Jerome Holloway. Two precautionary instructions to the jury, this being given to you for the sole purpose of your determining the experience of this witness, determining what he states, his technique and his background and his learning and what he used, the tools to make the comparison. You understand that you cannot assume the role of the expert in, and decide from that whose voice that is. In other words, you're only looking at this opinion and what he based his opinion on. You cannot decide it's not this defendant and someone else. Do you understand that it is not your role as jurors? You are only simply listening to determine whether or not this witness knows what he speaks. It is not the inten-

> tion of the People to have any probative value whatsoever as far as defendant Smith and Gilmore are concerned.

During final instructions to the jury the trial court stated:

> In some cases it is impossible by a description, however graphic, to explain technical or scientific matters or things so as to enable a person not trained in such matters, to comprehend or understand their special significance or application to issues before the court. In order to assist the jurors and the court to fully understand such matters, and to correctly apply them to the facts in issue, the testimony of certain witnesses has been received. When a scientific or expert witness testified you should treat it in the same manner as any other testimony in the case. The mere fact that it was offered by experts does not compel you to take their testimony in preference to any other, but you should give such testimony the same consideration, everything else being equal, as that of any other witness.

Petitioner raised no objection to either of the above instructions.

At trial Petitioner testified on his own behalf and suggested that another individual, Gary Braceful, had committed the crimes at issue. Braceful himself was found murdered the day after the bodies of Arnold and Kraft were discovered.

On rebuttal, the prosecutor introduced forensic evidence that Arnold, Kraft, and Braceful had all been murdered with the same weapon. The prosecutor discussed his rebuttal evidence during his initial summation:

> Defendant Gilmore went a step further, he not only said that he was elsewhere at the time and had nothing to do with this, but he has the propensity to hide behind dead

people. Only the two children can tell us was (sic), for sure, who killed them. They are dead. Only the children can tell us who got them from their apartment. We know who took them to their apartment, but who picked them up for sure (sic). The inference is that the three defendants did. But for sure, who did that? They are dead. They cannot tell us. The children could tell us who pulled that trigger on each of them. They are dead. Geary (sic) Braceful could tell us who brought those children into that apartment because the testimony from other witnesses was that he was there when the children were brought in. Gary Braceful could tell us what he knows about this, but he is dead. Mysteriously killed by the same weapon that shot those children. Johnny Stanley could tell us the reason Defendant Gilmore was at the apartment on Schaefer but she is dead. He thinks he went there to help her move. But I think the facts warrant the inference that he did not want to be around the 14th street apartment, so he went elsewhere. Johnny Stanley can't tell us that, because she is dead.

During final summation, the prosecutor made the following comments:

Now, the defendants attempt to explain away the death of Geary (sic) Braceful with the same gun by saying that, well, he must have been involved and was eliminated. Why weren't the other people who were involved or who witnessed what went on eliminated? Well, let's look at the testimony. There were three witnesses. The three of them who were summoned to the Schaefer Street apartment. Carol Payne, Denise James and Jackie Wesley. Perhaps they were not fool-hearted enough to say what they would tell. As a matter of fact they went the opposite way and told them they would not tell.

• • •

> Well, it is rather inconsistent with the defense position that Geary (sic) Braceful did it. Because if Geary (sic) Braceful did it, all they would have to do is say Geary (sic) Braceful did it. They would not have to lie. If Geary (sic) Braceful did it why are they not saying that Geary (sic) Braceful did it. Aren't they saying that Geary (sic) Braceful did it? They want to get off the hook. Off what hook? If we are to accept the defense position on one hand and that Geary (sic) Braceful did it then there is no hook for the other people to be on, is there? I am almost finished.

Petitioner lodged no trial court objection to any of the above prosecutorial comments.

REASONS FOR DENYING THE WRIT

I.

Direct state appellate review of Petitioner's assertion respecting improper prosecutorial comment was precluded by the absence of timely objection. *People* v *Gilmore*, 73 Mich App 463, 470-471; 252 NW2d 488 (1977). Similarly, the United States District Court concluded that under *Wainwright* v *Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977), the procedural default barred federal habeas corpus examination. *Gilmore* v *Koehler*, USDC-WN No. M78- 12CA2, April 28, 1982, p. 6.

The United States Court of Appeals conducted a thorough examination of Petitioner's misconduct allegations and concluded that none of the alleged errors offended the Federal Constitution. *Gilmore* v *Koehler*, USCA6, No. 82-1334, March 3, 1983, p. 2.

It is Respondent's view that under either of the above theories review in this forum is unwarranted.

II.

Petitioner argues that admission of forensic evidence (to wit: expert voice print testimony) and jury instructions thereon offended federal due process. The United States Court of Appeals examined Petitioner's claim and concluded:

> There was no error in the admission of the expert testimony; it is doubtful, moreover, that even if error had been committed in this regard that it adversely affected this appellant, particularly in light of the later precautionary instructions. The fact that the prosecution tied the caller, Holloway, to appellant, Gilmore, in respect to the kidnapping and the ultimate tragic outcome of the kidnapping is not any basis for appellant's claim that his constitutional rights were somehow prejudice by the proceedings involving identification of the voice of Holloway as the caller who was seeking extortion money or a kidnap ransom.
>
> *Geary Gilmore* v *Theodore Koehler*, USCA6 No. 82-1334, March 3, 1983, p. 3-4.

A similar conclusion was reached on direct state appeal and in the United States District Court. Respondent contends that re-examination in this tribunal is unnecessary.

III.

Regarding Petitioner's assertion that counsel for a co-defendant violated his confrontation rights the Michigan Court of Appeals stated:

> We do not even perceive how the remarks of defendant Holloway's counsel concerning Holloway's mental state,

> which counsel couched in biblical terms, could incriminate defendants Gilmore and Smith.
>
> *People* v *Gilmore, supra,* 73 Mich App at 469.

Similarly, the United States Court of Appeals found no merit in Petitioner's claim:

> These remarks do not constitute any charge, inference or statement that appellant was the criminal actor; they represent an attempt on Holloway's lawyer's part to explain a way the testimony of witnesses that could be deemed detrimental to his client. The trial judge acted within his sound discretion in denying Gilmore's motion for severance, and appellant failed to demonstrate that any actions complained about at trial had a substantial or unfairly prejudicial affect upon him simply because he was on a trial with co-defendants Smith and Holloway.
>
> *Geary Gilmore* v *Theodore Koehler,* USCA6 Case No. 82-1334, March 3, 1983, p. 4-5.

It is Respondent's view that the above holdings are dispositive of Petitioner's assertion. Additional examination of this issue is unnecessary.

IV.

Petitioner's allegations respecting rebuttal evidence and subsequent argument thereon by the prosecution do not merit examination by this court. The offered evidence has been examined on direct and collateral review and found to be appropriate rebuttal. *People* v *Gilmore, supra,* 73 Mich App at 469. *Geary Gilmore* v *Theodore Koehler,* USCA6 No. 82-1334, March 3, 1983, p. 2. Similarly, the prosecutor's comments on rebuttal have been so examined and found to be proper argu-

ment on testimony offered during trial. *People* v *Gilmore, supra,* at 470; *Geary Gilmore* v *Theodore Koehler,* USCA6 No. 82-1334, March 3, 1983, p. 2.

RELIEF

WHEREFORE, for the foregoing reasons, Respondent respectfully requests this Honorable Court deny Petitioner's application for writ of certiorari.

Respectfully submitted,

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